NS SENG SDN BHD v. SYARIKAT GEMILANG & ORS

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[WRIT SUMMONS NO. BA-22NCVC-491-11-2020]
14 MAY 2024

Abstract – *The party claiming damages, special or general, bears the burden of proving the fact and quantum of damages suffered. In the event that documentary evidence is available to support any claim of damages, such evidence must be tendered as proof. Oral evidence alone would not be sufficient where documentary evidence is available; s. 59 of the Evidence Act 1950.*

CONTRACT: *Agreement – Breach – Agreement to supply petroleum products to operator of service station retailing fuel and petroleum products – Revocation of agreement by service station operator when supplier intended to source petroleum product from new brand – Whether service station operator breached supply agreement – Service station operator discharged burden of proof on claim of 'inequality of bargaining power' and 'unfair advantage' – Whether supply agreement proved to be null and void – Whether wrongful revocation – Whether breach of supply agreement established*

CONTRACT: *Breach – Damages – Agreement to supply petroleum products – Wrongful revocation of supply agreement – Whether documentary evidence adduced to support oral evidence on loss of profits – Whether oral evidence insufficient where documents available – Whether supplier discharged burden of proving quantum of damages – Whether only nominal damages awarded – Evidence Act 1950, s. 59*

This was a suit by the plaintiff against the defendants for breach of a supply agreement between the plaintiff and the first defendant. The first defendant ('D1'), a partnership, was the operator of a service station which retailed fuel and petroleum products to the general public at a service station located on a piece of land. Haji Amer ('DW2') was the registered proprietor of the land and, the founder of D1 and the service station business and father to the second to fourth defendants. The plaintiff carried on the business of supplying petroleum products, sourced from nominated oil companies or companies licensed to supply petroleum products ('NOC'), for a commission. The plaintiff had been supplying petroleum products to D1 under the brand BHP. The dispute between the parties arose after the plaintiff informed D1 that it intended to source the petroleum products for supply to D1 from Five Petroleum Malaysia Sdn Bhd ('Five Petroleum') as the NOC in place of BHP. Thereafter, D1 informed the plaintiff that it was not interested in continuing with the supply agreement with the plaintiff because (i) the rate of commission offered was too low; and (ii) it lacked confidence in the new brand Five Petroleum. D1, in its letter dated 5 November 2020

to the plaintiff asked for feedback on the process to revoke the supply agreement and for the plaintiff to list settlement steps with regards to the revocation of the supply agreement, failing which D1 would deem the supply agreement as revoked within 14 days from the date of the letter. The plaintiff did not reply to D1's letter. Thus, D1 deemed the supply agreement revoked as at 19 November 2020. Hence, this suit wherein the plaintiff sought a declaration that the defendants had breached the supply agreement and damages for loss of profit in the sum of RM2,047,239.16. In turn, the defendants counterclaimed for a declaration that the supply agreement was void and invalid. The issues that arose for the court's determination were: (i) whether there was inequality of bargaining power which gave the plaintiff an unfair advantage in the supply agreement; (ii) whether the supply agreement was null and void; (iii) whether D1 had breached the supply agreement; and (iv) whether the plaintiff had suffered loss of profit in the sum of RM2,047,239.16.

Held (allowing plaintiff's claim; dismissing defendants' counterclaim):

(1) D1, in its letter dated 5 November 2020, informed the plaintiff that it had revoked the supply agreement because of the low commission rate offered and its lack of confidence in Five Petroleum. However, in their statement of defence, the defendants pleaded that the supply agreement was null and void because of 'inequality of bargaining power' and 'unfair advantage'. In their counterclaim, the defendants sought a declaration that the supply agreement was null and void. The defendants did not provide any evidence of 'inequality of bargaining power' between the parties and 'unfair advantage' to the plaintiff under the supply agreement and thus, failed to discharge their burden of proof. There was no inequality of bargaining power between the parties or unfair advantage to the plaintiff in the supply agreement. Therefore, the supply agreement was not null and void. (paras 17, 19 & 24-26)

(2) It was clear from the terms of the supply agreement that D1 may only terminate the agreement if the plaintiff failed to supply fuel and/or petroleum products to D1's service station for a continuous period of 30 days. However, D1 had unilaterally revoked the supply agreement because of the low commission rate offered and its lack of confidence in Five Petroleum. Additionally, the defendants failed to adduce any evidence to prove their pleaded case of 'inequality of bargaining power' between the parties and 'unfair advantage' to the plaintiff under the supply agreement. DW2 also confirmed that the plaintiff had given him a draft of the supply agreement to read, and that he chose not to read the draft supply agreement before freely signing it on behalf of D1. Accordingly, by D1's wrongful revocation of the agreement, the defendants had breached the supply agreement. (paras 29-32)

(3) The plaintiff, by oral evidence tendered through PW1, stated that the margin earned by D1 for every litre of fuel sold at its service station was the difference between the automatic pricing mechanism ('APM') for petrol and diesel set by the Government for petroleum products in Malaysia less the amount invoiced by BHP for the petrol and diesel supplied to D1. However, the plaintiff did not produce any documents to show the Government's mandated margin ('GMM') and APM for the relevant period. As the amount of GMM and APM were contained in documents, pursuant to s. 59 of the Evidence Act 1950 ('EA'), the plaintiff could not prove the amounts by PW1's oral evidence alone. (paras 41 & 47)

(4) Further, PW1's testimony as to the rates of rebate contradicted the contractual term stipulated in the supply agreement and the plaintiff's own spreadsheet. The plaintiff did not adduce any documentary evidence to show the contractually agreed rate between BHP and the plaintiff of the volume and transport rebates for every litre of RON 95 petrol and diesel sold and supplied to D1. As the facts relating to the rebates are contained in documents, pursuant to s. 59 of the EA, the plaintiff could not prove these rates of rebates by oral evidence alone and hence, the plaintiff did not discharge its burden of proving the rates in the spreadsheet were correct. (paras 54, 60 & 61)

(5) PW1 showed the projected volumes for 2021 to 2038 to calculate the loss of profit, which were based on the plaintiff's assumption that: (i) the volume of petrol and diesel supplied to D1 would increase by 5% every year from 2021 until 2038; and (ii) the supply agreement would go on until 2038. The plaintiff also did not produce its statement of accounts for the relevant period, *ie*, for the financial 2019 to prove the amount of fuel supplied, the rebates it earned, and the rebate and transport costs it paid in respect of the fuel supplied to D1. By failing to produce its statement of accounts, the plaintiff failed to tender formal proof of loss of profit. The plaintiff failed to discharge its burden of proving the quantum of damages and therefore, was only awarded nominal damages. (paras 72, 90, 92, 96 & 97)

Case(s) referred to:

Bonham-Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***

Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd [2014] 6 CLJ 269 FC ***(refd)***

Popular Industries Ltd. v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal [2021] 10 CLJ 206 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 34, 45(1), 59, 60(1)(b), 101, 102

For the plaintiff - Arthur Wang Ming Way, Nurufarhina Ab Rahim & Vicky Ong Xiao Qiu; M/s Arthur Wang, Lian & Assocs
For the defendant - Mohamad Kamarulzaman Jusoh & Arzila Ahmad; M/s Hanif Hassan & Co

Reported by S Barathi

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This is a suit by the plaintiff against the defendants for breach of a supply agreement between the plaintiff and the first defendant ('D1') dated 1 March 2008 ('the supply agreement').

[2] D1 is the operator of a service station located on EMR 4750, Lot No. 1974, Mukim Tanjong Duabelas, Daerah Kuala Langat, Selangor ('land'). It retails fuel and petroleum products to the general public at the service station located on the land. D1 is a partnership established on 6 March 1987 under the Partnership Act 1961.

[3] Hj Amer bin Risman (referred to in this judgment as 'Hj Amer' or 'DW2') is the registered owner of the land. He is the founder of D1 and the service station business operated by D1 on the land. He is the father of the second, third and fourth defendants ('D2', 'D3' and 'D4'). D2, D3 and D4 are partners of D1.

[4] The plaintiff is a private limited company. It carries on the business of supplying petroleum products to, among others, dealer-owned dealer-operated petrol stations such as D1, for a commission. The petroleum products are sourced from nominated oil companies or companies licensed to supply petroleum products ('NOCs').

[5] The plaintiff had been supplying petroleum products to D1 since 1987 – first under the brand 'BP' and then under the brand 'BHP Petroleum' after British Petroleum's business in Malaysia was purchased by Boustead Petroleum Marketing Sdn Bhd ('BHP').

[6] The dispute between the parties arose after the plaintiff wrote to D1, through letters dated 5 February 2020, 11 February 2020 and 7 October 2020, informing D1 that it intended to source the petroleum products for supply to D1 from Five Petroleum Malaysia Sdn Bhd ('Five Petroleum') as the NOC in place of BHP.

[7] D1 in its letter dated 11 October 2020 entitled 'Pembatalan Perjanjian Pembekalan Minyak Petrol dan Diesel dan Pembatalan Proses Pertukaran Penjenamaan kepada Five di Stesen Minyak BHP Bukit Changgang' informed the plaintiff that it was not interested in continuing with the supply agreement with the plaintiff because: (i) the rate of commission offered was too low; and (ii) it lacked confidence in the new brand Five Petroleum.

[8] In a subsequent letter dated 5 November 2020 to the plaintiff, D1 asked for feedback from the plaintiff on the process to revoke the supply agreement. It asked the plaintiff to list settlement steps with regards to the revocation of the supply agreement, failing which D1 will deem the supply agreement as revoked within 14 days from the date of the letter.

[9] The plaintiff did not reply to D1's letter. Thus, based on its letter of 5 November 2020, D1 deemed the supply agreement revoked as at 19 November 2020.

[10] The plaintiff filed this writ action against D1 on 23 November 2020 for breach of the supply agreement. It subsequently amended its writ and statement of claim to include D2, D3 and D4 as defendants.

[11] The plaintiff seeks a declaration that the defendants had breached the supply agreement and damages for loss of profit in the sum of RM2,047,239.16.

[12] The defendants in turn counterclaim for a declaration that the supply agreement is void and invalid.

[13] After full trial, based on the evidenced adduced before this court and the testimonies of witnesses, this court found that the plaintiff successfully proved that the supply agreement was not null and void, and that the defendants had breached the agreement. However, the plaintiff failed to prove the quantum of damages claimed. Accordingly, this court gave judgment to the plaintiff, dismissed the defendants' counterclaim and awarded the plaintiff nominal damages of RM10,000 only.

[14] The full reasons for this court's decision are set out in this judgment.

Issues To Be Tried

[15] The primary issues for this court's determination are:

(i) whether there was inequality of bargaining power which gave the plaintiff an unfair advantage in the supply agreement?

(ii) whether the supply agreement is null and void?

(iii) whether D1 had breached the supply agreement? and

(iv) whether the plaintiff had suffered loss of profit in the sum of RM2,047,239.16?

Issue (a): Was There Inequality Of Bargaining Power And Unfair Advantage?

Issue (b): Was The Supply Agreement Null And Void?

[16] Pursuant to the supply agreement, the plaintiff agreed to source petroleum products from a NOC for supply to D1. The petroleum products are fuel (RON 95 petrol and diesel) and lubricants marketed by the NOC under the NOC's brand, trade name and/or trademark. The NOC, at its own costs, will also supply, install, erect and/or provide to D1 such equipment necessary for D1 to dispense and sell the fuel and petroleum products at the service station.

[17] D1, in its letter of 5 November 2020, informed the plaintiff that it revoked (batalkan) the supply agreement because of the low commission rate offered and its lack of confidence in Five Petroleum.

[18] Mohamed Shahril bin Amer ("DW1 ") is Hj Amer's son and one of the partners of D1 since 23 January 2013. He is currently the manager of the service station. Under cross-examination, DW-1 confirmed that he had signed D1's letter of 11 October 2020 revoking the supply agreement. He agreed the letter was to inform the plaintiff that D1 was not interested in continuing the supply agreement because of the low commission rate offered and the defendants' lack of confidence in Five Petroleum.

[19] However, in their statement of defence, the defendants pleaded that the supply agreement was null and void because of "inequality of bargaining power" and "unfair advantage". In their counterclaim against the plaintiff, the defendants sought for a declaration that the supply agreement was null and void.

[20] The defendants stated in para. 4.4 of their defence that the plaintiff had used the good business relationship between the plaintiff and the defendants, which was based on "mutual trust and respect", to influence the defendants to sign the supply agreement which gave the plaintiff an "unfair advantage" over the defendants.

[21] The plaintiff had been supplying petroleum products to D1's service station since 1987. The defendants pleaded that the parties' relationship, was based on "mutual trust and respect" between the late Mr Seng, who was the founder of the plaintiff, and Hj Amer. The defendants stated that prior to entering into the supply agreement, the agreement between the plaintiff and D1, for the supply of petroleum products by the plaintiff to D1 was a verbal agreement based on "mutual trust and respect". The defendants claimed that the plaintiff had used this "mutual trust and respect" between Mr Seng and Hj Amer to influence (mempengaruhi) D1 to enter into the supply agreement in 2008.

[22] The supply agreement was signed by Hj Amer on behalf of D1. Hj Amer testified that the plaintiff had given him a copy of the draft of the supply agreement for him to review before signing it. Hj Amer said that he, however, chose not to read the draft agreement before signing it. He said he had freely (dengan rela hati) signed the supply agreement.

[23] The burden of proof is on the defendants to prove their allegation of "inequality of bargaining power" and "unfair advantage": see ss. 101 and 102 of the Evidence Act 1950.

[24] However, during the trial, the defendants did not provide any evidence of "inequality of bargaining power" between the parties and "unfair advantage" to the plaintiff under the supply agreement. Hj Amer testified that he was given a draft of the agreement prior to D1 entering into the agreement. He also said he had signed the supply agreement freely (dengan rela hati). Additionally, DW1 confirmed the reason D1 wanted to revoke the supply agreement was because of the low commission rate offered and its lack of confidence in Five Petroleum.

Findings On Issue (a) And (b)

[25] With respect to issue (a), by reason of the defendants' failure to discharge their burden of proof, I find that there was no inequality of bargaining power between the parties or unfair advantage to the plaintiff in the supply agreement.

[26] As for issue (b), since the defendants failed to prove there was inequality of bargaining power or unfair advantage, I find that the supply agreement was not null and void.

Issue (c): Did The Defendants Breach The Supply Agreement?

[27] Under cls. 1.1 and 1.2 of the supply agreement, the plaintiff agreed to supply D1 fuel and petroleum products (sourced from NOCs). The plaintiff agreed in cl. 3.1 of the supply agreement that it will supply (or procure the supply) to D1, fuel and petroleum products, for purposes of enabling D1 to sell the fuel and/or petroleum products at the service station.

[28] Clause 3.2 of the supply agreement stipulates that in the event, the plaintiff fails to supply the fuel and/or petroleum products to D1 for a continuous period of 30 days, D1 is entitled to terminate the supply agreement. Clause 3.2 reads:

> 3.2 It is hereby agreed by the parties hereto that in the event that NSS shall fail to supply the Fuel and/or Petroleum Products to the Operator for a continuous period of thirty (30) days, the Operator shall be entitled to terminate this Agreement whereupon this Agreement will be terminated and NSS or the NOC/Company, as the case may be, shall forthwith be entitled to remove Equipment at the Service Station.

[29] It is clear from the terms of the supply agreement that D1 may only terminate the agreement if the plaintiff fails to supply fuel and/or petroleum products to D1's service station for a continuous period of 30 days.

[30] However, D1 had unilaterally revoked the supply agreement because of the low commission rate offered and its lack of confidence in Five Petroleum – the new NOC proposed by the plaintiff.

[31] Additionally, the defendants failed to adduce any evidence to prove their pleaded case of "inequality of bargaining power" between the parties and "unfair advantage" to the plaintiff under the supply agreement. Furthermore, Hj Amer confirmed that the plaintiff had given him a draft of the supply agreement to read, and that he chose not to read the draft agreement before freely signing the supply agreement on behalf of D1?

Findings On Issue (c)

[32] Accordingly, for these reasons, I find that the defendants had breached the supply agreement by D1's wrongful revocation of the said agreement.

Issue (d): Whether The Plaintiff Had Suffered Loss Of Profit In The Sum Of RM2,047,239.16?

[33] Having found that the supply agreement was not null and void and that the defendants had breached the agreement, I come to the fundamental question of whether the plaintiff has proved its claim for damages or at all.

[34] The plaintiff claims that by reason of D1's wrongful revocation of the supply agreement, it suffered loss of profit in the sum of RM2,047,239.16. The plaintiff asserts that the damages claimed are their loss of profit for the years 2021 to 2038.

[35] The burden of proving both the fact and the quantum of damages claimed lies with the plaintiff. In *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360 Edgar Joseph Jr (as he then was) said:

> *It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.*
>
> Thus nominal damages may be awarded in all cases of breach of contract. (See *Marzetti v. Williams* [1830] 1 B & Ad 415). And, *where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages.* See, for example, *Dixon v. Deveridge* [1825] 2 C & P 109 and *Twyman v. Knowles* [1853] 13 CB 222.
>
> (emphasis added)

[36] The Federal Court in *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269; [2014] 4 MLJ 465; [2014] 4 AMR 301 per Arifin Zakaria CJ held:

> [32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. **The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed**. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him. (See s. 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action.
>
> [33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. ...
>
> (emphasis added)

[37] In *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* [2021] 10 CLJ 206; [2021] 6 MLJ 619, [2021] 8 AMR 427, the Federal Court held:

> [66] It is trite law that the party claiming damages, special or general, bears the burden of proving the fact and quantum of damages suffered. Edgar Joseph Jr J, writing on behalf of the Federal Court, in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 explained that in the assessment of damages for the breach of contract, the main objective is to place a party who has sustained a loss as a result of breach in the same situation as if the contract has been performed. **In other words, the award for damages is compensatory in nature, and as such, the burden of proving damages or loss lies with the plaintiff**.
>
> (emphasis added)

[38] It is based on these principles that, I examine the evidence adduced by the plaintiff to determine whether it has proved the fact of damage and the quantum of damages claimed.

[39] The plaintiff pleads that the damages suffered are the loss of profits for the years 2021 to 2038 and the amount of damages is the loss of profits the sum of RM2,047,239.16. The quantum of loss of profits was calculated by its business support manager, Tan Kin Guan ("PW1").

[40] PW1 explained in QA13 of his additional witness statement (marked as "WS(T)-PW1") how the plaintiff earns its income from the supply of petroleum products by BHP to D1 under the supply agreement. He stated that the plaintiff has two sources of income for the fuel and petroleum products supplied to D1 under the supply agreement. The sources of income are:

(i) the difference between the Government mandated margin ("GMM") for petrol dealers in Malaysia and the "margin earned by D1"; and

A (ii) the contractual rebate rate paid by BHP to the plaintiff for every litre of petrol and diesel supplied to D1.

[41] PW1 said the "margin earned by D1" for every litre of fuel sold at its service station is the difference between the Automatic Pricing Mechanism ("APM") for petrol and diesel set by the Government less the B amount invoiced by BHP for the petrol and diesel supplied to D1.

[42] PW1 said that since January 2019, the GMM for petrol dealers in Malaysia is RM0.15 (15 sen) per litre for RON 95 petrol and RM0.10 (10 sen) per litre for diesel. The plaintiff, however, did not adduce any documents to support PW1's claim as regards the rate of the GMM since C January 2019.

[43] PW1 then took BHP's invoice dated 26 December 2019 which showed that BHP had invoiced D1 the sum of RM1.92 per litre for RON 95 petrol and the sum of RM2.07 per litre for diesel. PW1 said that the APM D for the week of 21 December 2019 to 27 December 2019 was RM2.08 for RON 95 petrol and RM2.18 per litre for diesel. He said, therefore, D1's margin (*ie*, the difference between the APM price and the price invoiced by BHP) was RM0.16 (16 sen) per litre for RON 95 petrol and RM0.11 (11 sen) per litre for diesel.

E **[44]** PW1 said that since the GMM for petrol dealers was RM0.15 (15 sen) per litre for RON 95 petrol and RM0.10 (10 sen) per litre for diesel, the plaintiff would recoup the RM0.01 (1 sen) extra margin per litre from the defendant under the supply agreement.

[45] Again, like PW1's testimony on the GMM since January 2019, the F plaintiff did not produce any documents during the trial to support PW1's testimony as to the APM for RON 95 petrol and diesel for the period of 21 December 2019 to 27 December 2019.

[46] Section 59 of the Evidence Act 1950 states:

G All facts, **except the contents of documents**, may be proved by oral evidence.

(emphasis added)

[47] The Government's GMM and APM for petroleum products in Malaysia would be in documents issued by the relevant Ministry or Minister H or at the very least reported in the press. However, the plaintiff did not produce any documents during the trial to show the GMM and APM for the relevant period. As the amount of GMM and APM set by the Government are contained in documents, pursuant to s. 59 of the Evidence Act 1950 the plaintiff cannot prove the said amounts by PW1's oral evidence alone.

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Rates Of Rebate

[48] PW1 said that the contractual rate of rebate for December 2019 from BHP to the plaintiff for (a) RON 95 petrol was RM0.04430 per litre, and for (b) diesel was RM0.3630 per litre.

[49] But on the spreadsheet PW1 had prepared to show the plaintiff's calculation of their alleged loss of profit of RM2,046,239.16 (bundle B1/ p. 97), the rates of rebate were (a) for RON 95 petrol: a higher rate of 0.04723 per litre, and (b) for diesel: a higher rate of 0.05923 per litre.

• At the bottom left of the spreadsheet, the following was stated:

*** Rate =	Volume Rebate plus Transport Rebate paid by BHP Minus Rebate paid to Syarikat Gemilang minus Transport Rate paid to transporters

• At the bottom right of the spreadsheet. the following was stated:

	Petrol	Diesel
Volume Rebate from BHP	0.0543	0.0463
Plus Transport Rebate paid by BHP	0.0242	0.0242
Minus Rebate paid to Syarikat Gemilang	0.02	0
Minus Transport Rate paid to transporters	0.01127	0.01127
	0.04723	0.05923

[50] Pursuant to cl. 4.1 of the supply agreement, the "monthly sales target", *ie*, the amount of fuel D1 is contracted to purchase is 200,000 litres of petrol and "as per allocated Quota" for diesel. Clause 4.1(a) reads:

> 4.1 The Operator agrees and covenants with NSS as follows:
>
> (a) The Operator shall purchase (subject to the Operator obtaining all the relevant licenses and permits to operate the Service Station) the Fuel and/ or Petroleum Products set out below ("the Monthly Sales Target") at a price as set out in the Second Schedule attached hereto:

Products	Monthly Sales Target
Petrol (Ron 92 & Ron 97)	200,000 litres
Diesel	As per allocated Quota

> NSS shall have the absolute right to discontinue the supply of any of the above specified Fuel and/or Petroleum Products at any time and/or from time to time in which event the Monthly Sales Target are not met. *In the event that the Operator is able to meet the Monthly Sales Target, NSS will grant the Operator such rebates as more specifically set out in the Second Schedule attached hereto. In the event that the Operator shall exceed the Monthly Sales Target, the rebate shall be determined by NSS at NSS's sole discretion*. Notwithstanding anything, the Monthly Sales Target shall not exceed aa variance of Ten per cent (10%) without the prior consent of NSS.
>
> (emphasis added)

[51] Per cl. 4.1 (a), if D1 meets the "monthly sales target", the plaintiff will pay D1 the rebate specified in the Second Schedule of the supply agreement. The rebate specified for petrol is RM0.02 (2 sen) above the Government's then prevailing standard commission. There is no rebate for diesel specified in the Second Schedule. The provision in the Second Schedule of the supply agreement is reproduced below:

> **The Rebate**
>
> 1. Petrol: 2.0 sen above the Government's then prevailing standard commission, if any, per litre.
>
> *Agreed rebate, if any, and subject always to Clause 4.1(a) of this Agreement
>
> (emphasis added)

[52] However, during the trial, PW1 said that the plaintiff will recover from D1 the 1 sen difference between the GMM and the margin earned by D1 from BHP for the sale of BHP branded petrol and diesel (instead of paying the plaintiff the 2 sen above the "Government's prevailing standard commission" for petrol as stipulated in the supply agreement).

[53] Additionally, in the explanation on the spreadsheet (reproduced in para. [49] above), the rate of rebate is calculated on the basis that the plaintiff continues to pay D1 the rate of rebate of RM0.02 (2 sen) for petrol and 0 sen (*ie*, no rebate) for diesel.

[54] So, which is it – was the rebate paid to D1 or recovered from D1? Did the plaintiff pay D1 a rebate of 2 sen, or did it recover a rebate of 1 sen, for every litre of fuel supplied to D1? What is the correct rate of rebate? PW1's testimony as to the rates of rebate contradicts the contractual term stipulated in the supply agreement and the plaintiff's own spreadsheet, which PW1 said he had prepared.

[55] The plaintiff sought to persuade this court of the veracity of PW1's oral testimony on the transport and the volume rebates, and the spreadsheet that PW1 had prepared, by producing copies of documents entitled "transport rebate summary" and "volume rebate summary" all dated 31 December 2019 from BHP to the plaintiff. On these documents are line items of the following:

Item Description	Customer Ref	Quantity	Unit Price	Amount

[56] I note the "customer Ref" on every line item on all the copies of the "volume rebate summary" are the same *ie*, "2100116813". Similarly, all the "customer Ref" on the copies of the "transport rebate summary" are also all the same *ie*, "2100116815". No explanation was given during the trial as to whom these numbers refer to.

[57] The line items on the copies of the rebate summaries do not state to whom the fuel was sold and to which service station the fuel was delivered. Instead, the handwritten word "gemilang" is on some of the line items next to the "unit price" column. The plaintiff sought to persuade this court that this handwritten word "gemilang" next to the line items is proof of the transport rebate and volume rebate received from BHP for the RON 95 petrol and diesel supplied to D1's service station.

[58] The plaintiff did not call any witness from BHP to testify during the trial that the amount in the line items with the handwritten word "gemilang" was indeed the transport rebate and volume rebate that BHP had paid to the plaintiff for the RON 95 petrol and diesel supplied to D1's service station in the month of December 2019.

[59] Additionally, the volume and transport rebates and the transport rate paid to transporters, written by PW1 in the spreadsheet would be in documents such as agreements or letters between D1 and BHP and D1 and the transporter.

[60] However, the plaintiff did not adduce any documentary evidence during the trial to show the contractually agreed rate between BHP and the plaintiff of the volume and transport rebates for every litre of RON 95 petrol and diesel sold and supplied to D1.

[61] Accordingly, as the facts relating to the rebates are contained in documents, pursuant to s. 59 of the Evidence Act 1950, the plaintiff cannot prove these rates of rebates by PW1's oral evidence alone. Although PW1 had written these rates in a document (*ie*, the spreadsheet in bundle B1/p. 97 that he prepared) because of the plaintiff's failure to produce the documents showing the GMM, APM, and the agreed rates of transport and volume rebates with BHP, I find that the plaintiff did not discharge its burden of proving the rates which PW1 wrote in the spreadsheet are correct.

[62] As regards the transport costs paid by the plaintiff to the transporter for delivering fuel to D1, the plaintiff produced a document entitled "Siong & Soo Enterprise, Truck No: WGC 2122 December 2019". In the document, there is a table showing various deliveries to various customers

on various dates in December 2019. Among the customers is D1. Based on the entries in the table, three deliveries were made to D1 in December 2019 by the transporter, which are as follows:

Date	Customer	Quantity
3 Dec	Syarikat Gemilang	13,650
14 Dec	Syarikat Gemilang	13,650
26 Dec	Syarikat Gemilang	19,110
Total	46,410	

[63] The table shows that the total deliveries made to D1 in December 2019 by "Siong & Soo Enterprise, Truck No: WGC 2122" was 46,410 – it is not stated in the table whether the quantity delivered was measured in litres and whether the fuel delivered was RON 95 petrol or diesel or both.

[64] However, the plaintiff's table in bundle B1/p. 101 shows that a total of 101,170 litres of RON 95 and 7,930 litres of diesel was delivered to D1 in December 2019. On the assumption that the 46,410 litres of RON 95 petrol was delivered by "Siong & Soo Enterprise, Truck No: WGC 2122' to D1 in December 2019, the question is which transport company (or companies) delivered the balance 54,760 litres (101,170 less 46,410) of RON 95 petrol to D1 in December 2019. Why did the plaintiff not produce during the trial the documents showing the transport costs paid to the other transport company (or companies) that had transported the rest of the RON 95 petrol and diesel to D1 in December 2019? Why did it base its calculation only on the transport costs paid to Siong & Soo Enterprise for delivery made by truck No: WGC 2122?

[65] Additionally, the plaintiff did not call any witness from BHP or any of the transporters to support its claim as to the rate of transport rebate and volume rebate agreed with BHP, the amount of rebates paid by BHP to the plaintiff, and the transport costs agreed with the transporters and paid by the plaintiff to the transporters, in respect of the fuel supplied and delivered to D1 in December 2019.

[66] Accordingly, with respect to learned counsel for the plaintiff, this court is unable to make a finding, based on PW1's oral testimony alone, as to the accuracy of the rates that PW1 had typed onto the spreadsheet without any supporting documents showing the contractual rates between the plaintiff and BHP, and the plaintiff and the transporters.

[67] Moreover, PW1's testimony as to the rates contradicts the express terms of the supply agreement and the figures that he said he had inputted onto the spreadsheet.

[68] This court is also unable to accept the handwritten word "gemilang" by persons unknown on the copies of the BHP rebate summaries, as proof of the rates and the amounts of rebate paid by BHP to the plaintiff in December 2019, with regards to the fuel supplied and delivered to D1.

[69] Furthermore, for the reasons discussed above, this court cannot give any weight to the document entitled "Siong & Soo Enterprise, Truck No: WGC 2122' as evidence of the transport costs paid by the plaintiff to all its transporters (and not just to Siong & Soo Enterprise) for the total amount of RON 95 petrol and diesel supplied and delivered to D1 in December 2019.

Base Volume And Projected Increase In Volume

[70] In the spreadsheet prepared by PW1, the base volume for the calculation of the plaintiff's alleged loss of profit was the volume for 2019. Although D1 deemed the supply agreement revoked on 19 November 2020 and the plaintiff had filed this action against the defendants on 23 November 2020, the plaintiff continued to source, and the defendants continued to accept, delivery of petroleum products by the NOC (BHP Petroleum) to D1 under the supply agreement until D1 filed its counterclaim on 09 December 2020.

[71] The data shows that the volume of petrol and diesel supplied in 2020 was less than that in 2019. PW1 agreed that the reduction in volume was because of the COVID-19 pandemic.

[72] PW1 showed the projected volumes for 2021 to 2038 to calculate the loss of profit. The projected volumes are based on the plaintiff's assumption that: (i) the volume of petrol and diesel supplied to D1 wil increase by 5% every year from 2021 until 2038; and (ii) the supply agreement would go on until 2038 – that it will not be earlier terminated by either the plaintiff or D1(even though both parties have the right to terminate the supply agreement in accordance with the terms of the agreement).

[73] The supply agreement expressly states that the agreement is for a duration of 20 years ('initial period'), unless terminated or extended by the plaintiff. The plaintiff may, upon the expiry of the initial period, extend the agreement for a further period of two consecutive years of five years ('extended period'). The plaintiff may at any time terminate the supply agreement with immediate effect. Hence, if the plaintiff does not terminate the agreement and chooses to extend the agreement for the full extended period, the agreement will expire on 28 February 2038.

[74] Pursuant to cl. 3.2, D1 may terminate the supply agreement if the plaintiff fails to supply the fuel and/or petroleum products to D1 for a continuous period of 30 days.

[75] The supply agreement expressly states in clause 4.1 that if D1 does not meet the "monthly sales target", the plaintiff has the absolute right to discontinue the supply of fuel. Hence, based on cl. 3.2, if the plaintiff discontinued the fuel supply for a continuous period of 30 days, D1 may terminate the supply agreement.

[76] In calculating the plaintiff's loss of profit until 2038, PW1 assumed that the plaintiff would extend the agreement for ten years after the expiry of the initial period – he did not consider the fact that both the plaintiff and D1 have the right to terminate the supply agreement prior to 2038.

[77] Additionally, PW1 assumed in his calculation of the plaintiff's loss of profit from 2021 to 2038 that the volume of petrol and diesel supplied under the supply agreement to D1 will consistently increase by the rate of 5% every year from 2021 to 2038.

[78] PW1 said that the assumption was based on BHP's announcement at a conference that the industry increment is 5% and that its dealers are to try their best to increase the annual volume of petrol and diesel they supply by 5%. PW1 did not state when and where was the conference.

[79] More fundamentally, PW1 could not confirm whether he attended the conference where BHP was said to have made the announcement. When PW1 asked by the defendants' counsel during cross-examination, whether he attended the conference, PW1 said that he couldn't remember. PW1's testimony is reproduced below:

Defendants' berkenaan	Sorry tadi saya terlepas satu soalan yang conference tadi itu yang dibuat oleh BHP you ada hadir ke dalam conference itu? Ingat ke tak ingat?
PW1:	Tak ingat, ya.

[80] The 5% increment that PW1 used to calculate the loss of profit is not based on any official announcement or projection by the Government. Instead, it is based on what PW1 said BHP had announced at a conference, which PW1 cannot remember whether he attended. Save for PW1's oral testimony, the plaintiff did not produce any documents to prove the conference or what was announced by BHP during the conference.

[81] Under s. 60 of the Evidence Act 1950, oral evidence must be direct. For facts which could be heard, direct oral evidence is the evidence of a witness who says he heard it. Section 60(1)(b) of the Evidence Act 1950 reads:

60. Oral evidence must be direct

(1) Oral evidence shall in all cases whatever be direct, that is to say:

(b) **if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it**;

(emphasis added)

[82] PW1 cannot remember whether he had attended the conference. Hence, he could not have personally heard what BHP had purportedly announced at the conference. Therefore, his testimony as to the 5% annual increase in the annual of volume of petrol and diesel that BHP had purportedly announced at the conference is hearsay.

[83] Nonetheless, even if PW1 had attended the conference and personally heard the BHP representative say at the conference that the industry increment is 5% and for its dealers to try their best to increase the annual volume of petrol and diesel they supply by 5%, this, in my view, is an "aspirational statement" by the BHP representative – BHP wants its dealers to try their best to increase their volume of BHP branded petroleum products sold by 5% per year. BHP's purported statement does not mean that the plaintiff will definitely succeed in consistently increasing its supply of petrol and diesel to D1 by 5% every year from 2021 until 2038.

[84] During re-examination by the plaintiff's counsel, PW1 amplified his evidence on the 5% annual increase in volume and said that the information on the 5% increase "is not only based on the conference information provided by the oil company. We can simply get any information for the increment of the vehicles". I then asked PW1 where he could get the information from. He answered "I just go to Google". PW1's testimony is reproduced below:

Plaintiff's Counsel:	You were confronted with question in page 97 that look it no be 5% in 2019 and in 2020 the volume decreased. The consumption of the petroleum is decreased. And you asked that the defendant lawyer said that your calculations not correct. Not accurate and you disagree. Now can you explain why you disagree? Is that because of the average?
PW1:	Yes, based on the average and **we cannot based on the Covid years that 2020 and 2021 because it is clearly show that this case over**. The increment is not only based on conference information provided by the oil company. **We simply get the any information for the increment of the vehicles**.

Judge:	**Where did you get the information?**
PW1:	**I just go to the Google.**
Plaintiff's Counsel:	When you were asked about your calculation in 1997 [pg.97] has no basis and you disagree, the reason because you used the information and the average?
PW1:	Yes

(emphasis added)

[85] The plaintiff cannot seriously think that this court is persuaded that the plaintiff had proven on a balance of probabilities that the volume of petrol and diesel would consistently increase at the rate of 5% per year from 2021 to 2038 based on hearsay evidence and on information PW1 found on Google!

[86] This court cannot accept hearsay evidence and information that PW1 had obtained from Google as proof that there will be consistent annual increases at the rate of 5% per year in the volume of petrol and diesel that the plaintiff would have supplied to D1 from 2021 until 2038. Moreover, PW1 is not a quantum economist whose expert evidence on percentages of annual increase in fuel consumption this court may accept as relevant fact under s. 45(1) of the Evidence Act 1950.

[87] PW1, in calculating the plaintiff's loss of profits from 2021 to 2038, had assumed that the volume to be supplied to D1 will consistently increase by 5% every year – even though the figures in 2020 show that the amount supplied by plaintiff to D1 in 2020 decreased from that supplied in 2019. When challenged by the defendants' counsel during cross-examination, PW1 agreed that the volume can either increase or decrease, as it did in 2020. He also agreed that the volume would go down if there is a pandemic. PW1's testimony is reproduced below:

Defendants' counsel:	Tadi kamu katakan bahawa kenaikan sebanyak 5% setiap tahun? Pada tahun 2020, volume menurun, setuju ke tidak setuju?
PW1:	Setuju, sebab Covid.
Defendants' counsel:	Saya merujuk kepada mukasurat 101 Yang Arif Bundle B1, the volume 2020, volume. Begitu juga dengan volume 2018 dan 2019, menurun?
PW1:	Ya, betul.

Defendants' counsel:	**So, kenaikan 5% percent ini bukan satu kenaikan yang boleh dikatakan satu kenaikan tetap? la boleh menurun dan boleh kemungkinan akan naik? Setuju atau tak setuju?**
PW1:	**Setuju.**

...

Defendants' counsel:	2020 kamu kata tadi menurun sebab ada Covid betul?
PW1:	Ya, betul.
Defendants' counsel:	**Sekiranya ada apa-apa pandemic dia akan menurun?**
PW1:	**Setuju**

(emphasis added)

[88] PW1, during re-examination, said he could not base the calculation of loss of profit on fuel supplied in the "COVID years" of 2020 and 2021 "because it clearly shows the case is over': see the excerpt of PW1's testimony reproduced in para. [84] above.

[89] We know for a fact that PW1's statement that the "COVID case is over1' is incorrect. Data produced by Kementerian Kesihatan Malaysia (KKM) shows that to date COVID-19 is far from over.

Non-Production Of The Plaintiff's Statement of Accounts

[90] Furthermore, the plaintiff did not produce its statement of accounts for the relevant period *ie*, for the financial 2019 to prove the amount of fuel supplied, the rebates it earned, and the rebate and transport costs it paid in respect of the fuel supplied to D1.

[91] Section 34 of the Evidence Act 1950 states:

> Entries in books of accounts regularly kept in the course of business are relevant whenever they refer to a matter into which the court has to inquire, but the entries shall not alone be sufficient evidence to charge any person with liability.
>
> ILLUSTRATION
>
> A sues B for RM1,000 and shows entries in his account-books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt.

[92] By failing to produce its statement of accounts, the plaintiff failed to tender formal proof of loss of profit: see *Popular Industries* (*supra*) where Edgar Joseph Jr J (as he then was) held:

> Now, it was alleged by the plaintiffs that both the oral testimony of the accountant Mr. So (regarding their financial operations) and the statement P76 prepared by him, were based upon the results of his

examination of the account books of the plaintiffs for the relevant period. *However, the account books themselves were never produced and the defendants never dispensed with formal proof of the loss of profits alleged or at all. In my opinion, the result of this glaring omission, was to render such oral evidence of Mr. So and P76 inadmissible in evidence and it makes not the slightest difference that Mr. and Mrs. Segal confirmed the accuracy of P76*. I take the law on this point to be correctly stated by the *Vice-Chancellor in Johnson v. Kershaw* [1847], 1 Deg & Sm 260, 63 ER 1059. In that case the evidence of an accountant was tendered containing the results of his examination of certain partnership books, but the accounts books themselves upon which he based his statement were not in evidence. The Vice-Chancellor said:

> If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill, might be receivable; but, inasmuch as the books were not in evidence, I must decline to receive the deposition of Mr. Peet as to their contents.

That case commended itself to Dixon J (as he then was) in *Potts v. Miller* [1940], 64 CLR 282 at 303.

...

Without the evidence of the accountant Mr. So as to the financial operations of the plaintiffs and without P76, there was still the general and slender testimony of Mr. and Mrs. Segal, but *this testimony suffers from the same defects as to non-production of the account books hereinbefore mentioned and therefore does not, in my opinion, prove the damages claimed sufficiently or at all*. (emphasis added)

[93] In this instant case, the plaintiff, not only did not produce its statement of accounts for the financial year 2019, but it also did not call its accountant or person in charge of its finances to testify as to the loss of profits claimed. Instead, it called PW1, who is the plaintiff's business support manager. PW1, in his witness statement (marked as "WS-PW1"), said that he was in charge of the daily operations of the plaintiff's business – not of its accounts or its finances.

[94] The fact that learned counsel for the defendants did not call for the production of the plaintiff's statement of accounts does not make a difference. This is because the defendants never agreed to dispense with the formal and proper proof of the loss of profits claimed by the plaintiff in this suit. In *Popular Industries*, the counsel for the defendant similarly did not call for the plaintiff's book of accounts. Edgar Joseph Jr J held:

> Nor, does it make any difference that counsel for the defendants never called for production of the accounts books, since the defendants never agreed to dispense with formal and proper proof of the loss of profits. (See *Guan Soon Tin Mining Co. v. Ampang Estate Ltd.* [1972] CLJU 39; [1972] 1 LNS 39, 30 col 2 F to G.

Findings On Issue (d)

[95] It is fundamental for the plaintiff to prove both its damage and the quantum of damages. In his oft-quoted dictum, Lord Goddard in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 said:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[96] For all the reasons discussed above, I find that the plaintiff failed to discharge its burden of proving the quantum of damages. It failed to adduce formal proof and relevant evidence to prove the quantum of damages – making it impossible for this court to assess damages.

[97] In these circumstances, this court can only award nominal damages against the defendants for their breach of the supply agreement.

Decision

[98] Accordingly, judgment is given to the plaintiff.

[99] It is declared that the defendants had breached the supply agreement dated 1 March 2008.

[100] The defendants are ordered to pay the plaintiff nominal damages in the sum of RM10,000.

[101] The defendants' counterclaim is dismissed.

[102] Interest at the rate of 5% per annum on the judgment sum from the date of this judgment until full settlement.

[103] Costs in the sum of RM20,000 to be paid by the defendants to the plaintiff subject to the allocatur fee.